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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 580

ELIAS A. OLSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 581

RANDOR G. KARLSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 582

HARRY BREWSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court. The charge to the jury appears at R. 126. The opinion of the Circuit Court of Appeals appears

at R. 417–429. The dissenting opinion is at R. 429–439. The opinions are reported in 67 F. (2d) 24.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered August 21, 1933. (R. 439–440.) The petition for writs of certiorari was filed November 10, 1933, and granted December 11, 1933, pursuant to the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The question presented may be best expressed in the language of the Circuit Court of Appeals (R. 419):

> But one main issue is involved in these appeals. It is raised in the record in various ways—by exclusion of evidence, refusal to charge and the charge to the jury. The issue is whether the use of these properties for flowage purposes is such a use as, *under the circumstances here,* can be considered as an element of that value for which compensation must be made. (Italics ours.)

The "circumstances here" are set out in the statement. The question presented is whether, in their light, the past flooding of the lands in question, and their admitted physical availability for storing water, are elements of value in a condemnation case.

TREATIES AND STATUTES INVOLVED

Treaty of 1925 between the United States and Great Britain in respect of Canada, 44 Stat. (Pt. 3) 2108;

Treaty of 1909 between the United States and Great Britain relating to boundary waters between the United States and Canada, 36 Stat. (Pt. 2) 2448;

Act of May 22, 1926, c. 364, 44 Stat. 617, as amended by the Act of April 18, 1928, c. 379, 45 Stat. 431.

Pertinent parts of these treaties and statutes as amended are set forth in the appendix to petitioners' brief.

Webster-Ashburton Treaty of 1842, 8 Stat. 572;

Act of June 7, 1897, c. 3, 30 Stat. 62, 67;

Act of July 1, 1898, c. 545, 30 Stat. 571, 576.

Pertinent parts of these statutes and treaty are set forth in the appendix hereto.

STATEMENT

This is a condemnation proceeding instituted by the United States (R. 2) under the provisions of the Lake of the Woods Act (Act of May 22, 1926, c. 364, 44 Stat. 617) as amended by the Act of April 18, 1928, c. 379, 45 Stat. 431. The estate condemned is an easement of flowage up to elevation 1064, sea-level datum, upon lands bordering the Lake of the Woods, in Minnesota (R. 7–11). The Lake of the Woods is a large body of water, partly in Canada and partly in Minnesota. The surface area of the lake is 1485 square miles, with its main inlet by the Rainy River, along the international

border from the east, and its outlet to the north, in Canada, by the Winnipeg River. (Atlas, Ex. 24; Final Report of the International Joint Commission, Ex. 71, p. 14.) The rainfall in the watershed is heavy, and the rivers large. (Same, p. 112.)

In 1898 the Keewatin Power Company (a Canadian corporation), by agreement with the Crown, placed in operation a control dam (the Norman Dam) in Canada, near Kenora (R. 237), which caused an average rise in the lake level of about three feet, with resulting invasion of shore lands. The flooding of the shore lands has intermittently continued since 1898 and is substantially the level to be maintained hereafter. (R. 22–23; Final Report of the International Joint Commission, Ex. 71, pp. 16–18, 28–30, 53–54.) The easements involved here are over the shore lands so affected.

In 1909 a treaty was entered into between the United States and Great Britain with respect to Canada "relating to boundary waters" which created the International Joint Commission, with jurisdiction over such waters. (36 Stat. (Pt. 2) 2448, 2451.) Shortly thereafter the Lake of the Woods situation was referred to the Commission. After extensive studies, the final report of the Commission was submitted to the two governments in 1917. (Final Report of the International Joint Commission, Ex. 71.) As a result, in 1925 a treaty was entered into between the United States and Great Britain in respect of Canada "to regulate the level of the Lake of the Woods" and putting into

effect the recommendations of the International Joint Commission, permitting the acquisition of a flowage easement on the Minnesota shore lands. (44 Stat. (Pt. 3) 2108.)

To carry into effect this treaty the Act of May 22, 1926 (c. 364, 44 Stat. 617), as amended by the Act of April 18, 1928 (c. 379, 45 Stat. 431), was passed, in which the Secretary of War was required to acquire, by purchase or condemnation, "flowage easements up to elevation 1064 sea-level datum upon all lands in such State [Minnesota] bordering on the Lake of the Woods, Warroad River, and Rainy River, * * *."

Being unable to secure these flowage rights on various tracts by purchase, the present condemnation proceeding was instituted.

Commissioners appointed by the District Court for Minnesota in the condemnation proceedings made awards (R. 13), from which the United States and the present petitioners appealed to the District Court. The cases were consolidated for trial (R. 21) for the purpose of tendering an issue of law as to the admissibility of evidence of the contribution of Lake of the Woods to the development of hydro-electrical power on the Winnipeg River and the advantage to such development that might be derived from the storage of water on the shores of the lake. This testimony was proffered (R. 162) upon the theory that compensation should be made on the basis of "reservoir values" of the shore lands.

When this testimony was presented, the United States objected (R. 25) and was permitted (R. 136) to offer evidence as a foundation for its objection. This evidence showed, among other things, the following:

The mainland shore line of the Lake of the Woods (including the lower reaches of the Rainy River affected by the flowage) is (R. 138, 224, two estimates):

	Miles
In the United States	155 or 115
In Canada	1280 or 922
Total mainland	1435 or 1037

There are a number of large islands (1 mile or over in diameter) and approximately 10,000 small ones. The shore line of the islands is (R. 138, 224, two estimates):

	Miles
In the United States	33 or 25
In Canada	1625 or 1163
Total for islands	1658 or 1188

The total shore line (mainland and islands) is therefore:

	Miles
In the United States	188 or 140
In Canada	2905 or 2085
Total	3093 or 2225

The American shore line and islands are all in Minnesota. Of the Canadian shore line 35 miles of mainland are in Manitoba. The balance, and all the Canadian islands, are in Ontario. (R. 224.)

A considerable part of this long shore line was in private ownership. On the American side there

were 850 to 860 separate tracts, owned by 775 to 890 separate individuals, and subject to mortgages, etc., held by from 1200 to 1400 more. (R. 137–138.) The two lists contained some of the same names, but the District Engineer of the War Department had been able to record the interests of 1227 different persons. These persons were geographically distributed as follows (R. 139):

Near the lands	496
Elsewhere in Minnesota	186
In the United States outside Minnesota	102
In Canada	21
Deceased	21
Addresses unknown	401

The efforts of the War Department to acquire the flowage rights by purchase were successful in 7 cases. (R. 139.)

There were also, on the American side, considerable areas owned by the United States, some lands owned by the State of Minnesota, subject to contract for sale to private persons, and some held by private persons under homestead entries only. The location of these is shown on the map, Ex. 3. (R. 163.)

On the Canadian side, in Ontario, 723 leases or patents had been issued. Thirty-two of these were in Kenora and Keewatin (villages on the north shore of the lake), and had subsequently been subdivided into town lots and smaller parcels. (R. 225–226.) In Manitoba no patents had been issued. (R. 227.) The remaining Crown lands in Ontario (between elevations 1059 and 1064) aggregated 13,043 acres, and in Manitoba 14,427 acres.

(Final Report of the International Joint Commission—Ex. 71, p. 61.) The Crown lands along the lake in Manitoba were withdrawn from entry in 1915 (Ex. 66, R. 248–250), and in Ontario in 1920 (Ex. 66, R. 251–253), so as not to interfere with contemplated regulation of the level of the lake.

There were also, on the lake shore in Canada, some 40 Indian Reserves, with a total foreshore length of some 250 miles (Map Ex. 69, R. 263) and an area (below contour 1064) of 9813 acres. (Final Report of International Joint Commission, Ex. 71, p. 61.) Under the governing Canadian statute no part of an Indian Reserve could be disposed of "unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of 21 years, at a meeting or council thereof summoned for that purpose, according to the rules of the band" and unless, further, the release was approved by the Superintendent General. (Indian Act, R.S.Can., 1927, c. 98, Secs. 50, 51.)

Lake of the Woods itself is a public navigable water, one of those "water communications" which by Article II of the Webster-Ashburton Treaty of 1842[1] "shall be free and open to the use of the citizens and subjects of both countries." This free and open use, its protection and improvement, has been the concern of both the governments. We have already referred to the two later treaties on the sub-

[1] 8 Stat. 574; Malloy, *Treaties*, Vol. 1, p. 652, 653; see *Pigeon River Improvement Co. v. Cox*, Jan. 15, 1934, No. 126, present term.

ject. The interests of the United States throughout have been in navigation, and in the protection of its homesteaders upon the shore. (Final Report of the International Commission, Ex. 71, pp. 18–23.)

The actual level of the lake, however, depends on control measures at the outlets, and those outlets are in Canada. A succession of dams have existed at the outlets since 1887 (R. 157–159), and since 1898 those dams and the flow through them have continuously been controlled by the Governments of Ontario and the Dominion (R. 237–244). In 1925, under the present treaty, an international regime was added. The history of all this regulation is set out in the brief filed in this cause on behalf of the Government of Canada and will not be repeated. The evidence showed clearly that the outlets had been regulated by government authority since 1898, and that the purpose of the regulation was and is not water power primarily or chiefly, but the protection so far as possible of all the interests concerned—that is, navigation, domestic and sanitary uses of the water, fishing, lumbering and logging, lake shore resort and residence, water power, and irrigation. (Final Report of the International Joint Commission, Ex. 71, pp. 16–25, 41–52.) These interests conflict, and control by government could never be, and has not been, primarily or chiefly in the interests of power.

Upon this evidence the District Court concluded that the chance of any one acquiring, in one

interest, the right to flood the lake shore and control the outlets, in the interest of power, was nil. Therefore, he consistently excluded testimony tending to show value on that basis. Such testimony was offered in very many forms, but it was conceded on the trial that the many items offered "do not bear upon the question of any other value except the value of the flowage easements and the reservoir value of the property." (R. 162.) The District Court excluded all of it, and further charged the jury to exclude any claim for reservoir value. (R. 130.) Whether this was right is the only question in the case.

The judgment of the District Court was affirmed by the Circuit Court of Appeals, one judge dissenting. (R. 416–439.) The case is here on certiorari to that court.

SUMMARY OF ARGUMENT

I. The Government does not deny that an owner is entitled, in a condemnation case, to the market value of his land, including in that value any element of "special availability" for special uses which in fact exists in such form as really to influence the market value. But on the facts proved in this case the chance that any one ever could acquire the right to flood all of the lake shore of the lake, and also to control its levels, in the interests of water power, was nonexistent. For that reason it was proper to reject all evidence of special

value for that purpose, and to exclude it from the jury.

II. The actual flooding of the lands in question, in past years, shows merely that they could be flooded by control works in the outlets of the lake. That has never been disputed, but it does not show or tend to show that they had market value as a portion of a reservoir for power. Such value necessarily depended, not only on the physical possibility of such use, but also on the possibility in other respects of anyone acquiring the right to avail themselves of it in practice. Failing the latter possibility, the lands had no market value as a storage reservoir.

III. The true rule of damages is that applied below—namely, the difference between the market value of the lands before and after the taking—and not, as claimed by the petitioners, a separate "unit" of value for reservoir or flowage use. But even if the petitioners were right in this regard, the result would be the same, for the same facts that show "reservoir value" nonexistent as an element of general market value also show it nonexistent as a separate "unit."

IV. The offers to prove actual increased sales values of similar lands on account of water-power possibilities clearly referred to speculation based on the probability of Government taking, and were therefore properly excluded.

V. Whether the petitioners had, prior to the Treaty of 1925, a right to recover damages from the Canadian authorities for the flooding of their lands in Minnesota, is immaterial. If such a right had existed, and if the obligation had in fact been assumed by the United States, still the right and obligation had nothing whatever to do with the market value of the lands at the time of taking, which was the only question in this case.

VI. The decision below is not in conflict either with the Treaty of 1909 or that of 1925 or with the Act of May 22, 1926, but is in strict accord with all three.

VII. The decision below is also in accord with the local law of Minnesota.

ARGUMENT

I

"RESERVOIR VALUE" WAS NONEXISTENT IN FACT AND WAS THEREFORE PROPERLY EXCLUDED

The Government does not deny that an owner is entitled in a condemnation case to the market value of his land, including in that value any element of "special availability" for special uses which in fact exists in such form as really to influence the market value. This was settled a long time ago in *Mississippi Boom Company* v. *Patterson,* 98 U.S. 403, and has been held in many cases since. The question is, however, in each case not only whether such "special availability" physically exists in fact but

whether it exists in such form as to make it reasonably probable that any person could make use of it. If the facts show that the availability, although physically present, is not present in such form that it is possible for any one to acquire the right to use it, then it cannot in the nature of the thing create a market value. This proposition has frequently been decided and is made clear in particular by two decisions of this Court.

McGovern v. *New York*, 229 U.S. 363, dealt with a condemnation in the New York courts for a reservoir for use by the City of New York. The "reservoir value" had been excluded by the New York court, and the question here was whether such exclusion was a denial of due process. This Court held that it was not, and on the present question the Court said (p. 372):

> There are said to have been hundreds of titles to different parcels of that land. If the parcels were not brought together by a taking under eminent domain, the chance of their being united by agreement or purchase in such a way as to be available well might be regarded as too remote and speculative to have any legitimate effect upon the valuation. See *Chicago, Burlington & Quincy R.R. Co.* v. *Chicago*, 166 U.S. 226, 249. The plaintiff in error was entitled to be paid only for what was taken from him as the titles stood, and could not add to the value by the hypothetical possibility of a change unless

that possibility was considerable enough to be a practical consideration and actually to influence prices. *Boston Chamber of Commerce* v. *Boston*, 217 U.S. 189, 195. In estimating that probability the power of effecting the change by eminent domain must be left out. The principle is illustrated in an extreme form by the disallowance of the strategic value for improvements of the island in St. Mary's River in *United States* v. *Chandler-Dunbar Water Power Co.*, *ante*, p. 53.

City of New York v. *Sage*, 239 U.S. 57, was a similar condemnation which had been removed into the United States court and was tried there. The courts below had permitted an allowance for "reservoir value." This Court held that this was error, and said (p. 61):

> The decisions appear to us to have made the principles plain. No doubt when this class of questions first arose it was said in a general way that adaptability to the purposes for which the land could be used most profitably was to be considered; and that is true. But it is to be considered only so far as the public would have considered it if the land had been offered for sale in the absence of the City's exercise of the power of eminent domain. The fact that the most profitable use could be made only in connection with other land is not conclusive against its being taken into account, if the union of properties necessary is so practicable that the possibility would affect the market price.

> But what the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact—not what a tribunal at a later date may think a purchaser would have been wise to give, nor a proportion of the advance due to its union with other lots. The City is not to be made to pay for any part of what it has added to the land by thus uniting it with other lots, if that union would not have been practicable or have been attempted except by the intervention of eminent domain. Any rise in value before the taking, not caused by the expectation of that event, is to be allowed, but we repeat, it must be a rise in what a purchaser might be expected to give.

In the present case the facts are much stronger than they were in either of those cited. Not only is the project vastly larger, and the separate ownerships and titles more numerous, but there are involved five sovereignties—the United States, Canada, the State of Minnesota, and the Provinces of Ontario and Manitoba—instead of one. Much of the land belonged to government and a large part of it had been withdrawn from private entry for the purpose of permitting government regulation of the water level. Two hundred and fifty miles of shore line were held by forty Indian tribes and could not be surrendered except by the consent of a majority of the adult male members of the tribe in

each case and by permission of the appropriate Canadian Indian authority.

In the cases from New York there was no controversy over the uses of the water. It was entirely appropriate to use it for a domestic water supply and no other interest required its use. In this case not only were there other interests besides the power interest, but the desires and requirements of those other interests necessarily conflicted with the use of the water for water-power purposes. The most effective use for water power required the maximum storage of water in wet seasons and the maximum withdrawal in dry seasons, that is to say, necessarily the maximum fluctuation in the level of the water of the lake. Use for navigation, fishing, logging, summer cottages, resorts, or domestic sewerage, on the other hand, required a reasonably steady level of the lake, that is, a wasting of flood waters and a holding back of water in dry season. The Final Report of the International Joint Commission, Ex. 71, pp. 41 to 52, is most instructive on this question. The Governments of Canada and the United States had been committed ever since 1842 (Webster-Ashburton Treaty of 1842, 8 Stat. 572, Art. II) to the proposition that the lake "shall be free and open to the use of the citizens and subjects of both countries." Such free and open use for navigation, fishing, and rafting logs would be seriously interfered with by any regulation of the levels of the lake which had the development of water power as its principal objective. In addition,

by the Treaty of January 11, 1909, between the United States and Great Britain, relating to boundary waters (36 Stat. Pt. 2, p. 2448, 2451) it is agreed in Article 8 as follows:

> The following order of precedence shall be observed among the various uses enumerated hereinafter for these waters, and no use shall be permitted which tends materially to conflict with or restrain any other use which is given preference over it in this order of precedence:
>
> (1) Uses for domestic and sanitary purposes;
>
> (2) Uses for navigation, including the service of canals for the purposes of navigation;
>
> (3) Uses for power and for irrigation purposes.

It was quite inconceivable that any private interest should ever have the right to regulate the waters of the lake in the interest of water power.

Under the cases, therefore, it is clear that the development of the Lake of the Woods as a water-power reservoir in any private interest was not at any time a possibility, and the lands along its shore had no market value for that purpose.

II

THE ACTUAL FLOODING OF THE LANDS IN THE PAST DOES NOT SHOW OR TEND TO SHOW THAT THEY HAD A "RESERVOIR VALUE"

The lands in question have been flooded intermittently since 1898 as a result of control works

constructed at the outlets of the lake, near Kenora in the Province of Ontario, prior to that time, and put into operation in that year under the authority and control of the Government of Ontario. (R. 157–159, 237–244; Final Report of the International Joint Commission, Ex. 71, pp. 28, 53–57.)

It was for a long time thought, both by the Ontario authorities and by the United States War Department engineers that the high-water in the lake at various times after 1898 resulted from natural causes and that the only effect of the control works was to save water at low stages and raise the level at low-water. (Final Report of the International Joint Commission, Ex. 71, pp. 16 to 25, 53 to 56.) It was, however, found by the International Joint Commission that the effect of control works had in fact been to raise the average level of the lake in the years from 1892 to 1916, 3 feet above what it would have been if the outlets had remained as in a state of nature. (Final Report of the International Joint Commission, Ex. 71, p. 28.) It also appeared to the Commission that the extreme high-water which occurred in certain of those years, with considerable damage to property along the lake, was in part the result of the control works, and could and should in the future be prevented by the creation of new artificial outlets as a part of the proposed international control. (Final Report of the International Joint Commission, Ex. 71, pp. 28 to 30, 32 to 33, 63.)

It must, therefore, now be taken as established that lands on the shore of the lake were in fact flooded on occasions between 1898 and 1925, as a result in part of the control works at the outlets of the lake. The question is, however, whether this established fact shows or tends to show that the shore lands had any market value as a storage place for water. The flooding shows what is admitted, that water could be stored upon these lands. In other words, as nature built this lake its level can be raised by dams and the flood waters of wet seasons held for use in dry. The physical possibility of such use is all that is established by the flooding, and it has never been disputed.

To create the basis of the market value, it must appear not only that it is physically a possibility to use land for a certain purpose, but also equally that such use is otherwise reasonably possible as a commercial proposition. No one will pay money for a place to store flood waters unless, first, he has a reasonable chance to get all of the land needed to create his reservoir and, second, he has a reasonable chance to be able to control the level and make use of the water and the reservoir when once it has been created. The physical possibility of creating a reservoir is, of course, necessary to any market value for that purpose, but the other possibility is equally essential.

All that the flooding shows in this case is that the physical possibility was present. The other possibility was not and could not be, for the reason

set out under the first point. The flooding of itself, therefore, did not create or indicate a market value.

It is not correct to say, as the petitioners in substance do, that their lands in fact have been used since 1898 as a storage reservoir, for power purposes, or that they are going to be used for that purpose in the future under the international regime. The Final Report of the International Joint Commission (Ex. 71, pp. 16 to 25, 54) and the careful brief of counsel for the Government of Canada in this case show clearly that the regulation by Ontario and the Dominion Government have been intended, at least, merely to maintain a normal summer level in the interest of navigation. It now appears that the effect of those controls has been in part to flood the lands of the petitioners, but that is not the same as saying that the lands of the petitioners have been made use of to store water for power purposes.

Further, under the international regime control is not to be primarily or chiefly in the interest of power, but rather in the interest of all the persons in both countries who desire to use the lake and the water flowing out for many purposes. We have already referred to the conflict of desires between the owners of the water-power and the users of the lake for other purposes. The International Joint Commission saw the conflict clearly and it did not surrender to the water-power interests. The regulation which it recommended and which is made the basis of the Treaty of 1925 (by express refer-

ence in the preamble of the treaty) was aimed at maintaining a reasonably steady level in the waters of the lake, preventing on the one hand extreme flooding by the creation of new artificial spillways for flood water, and permitting a draft on the waters stored in the lake in excess of two or three feet "during periods of exceptional drought occurring about once in 20 years, for the purpose of maintaining a satisfactory outflow." (Final Report, Ex. 71, p. 26.) The report makes it quite clear that while the requirements of the water-powers in the Winnipeg River below the lake for a reasonably constant flow were considered important by the Commission, it considered more important a reasonably steady level in the lake, and the regulation which it recommended and which is established by the treaty was intended for both objects. (Final Report of the International Joint Commission, Ex. 71: Conclusions and Recommendations, pp. 26 to 31; Discussion, pp. 41 to 69.) The treaty itself says (Lake of the Woods Convention, July 17, 1925, 44 Stat. Part 3, p. 2108, 2109), Article II—

> The level of Lake of the Woods shall be regulated to the extent and in the manner provided for in the present Convention, with the object of securing to the inhabitants of the United States and Canada the most advantageous use of the waters thereof and of the waters flowing into and from the lake on each side of the boundary between the two countries for domestic and sanitary pur-

poses, for navigation purposes, for fishing purposes, and for power, irrigation and reclamation purposes.

Article IV—

The level of Lake of the Woods shall ordinarily be maintained between elevations 1056 and 1061.25 sea level datum, and between these two elevations the regulation shall be such as to ensure the highest continuous uniform discharge of water from the lake.

During periods of excessive precipitation the total discharge of water from the lake shall, upon the level reaching elevation 1061 sea level datum, be so regulated as to ensure that the extreme high level of the lake shall at no time exceed elevation 1062.5 sea level datum.

The level of the lake shall at no time be reduced below elevation 1056 sea level datum except during periods of low precipitation and then only upon the approval of the International Lake of the Woods Control Board and subject to such conditions and limitations as may be necessary to protect the use of the waters of the lake for domestic, sanitary, navigation and fishing purposes.

In other words, the regulation of these waters from 1898 to date by Canadian authorities and through the international regime have been and are, not in the interest of the development of water-power, but to protect, so far as possible, all the interests concerned.

This does not lessen the flooding of the lands in question. It does not decrease the actual damages of the petitioners or their right to be recompensed for those damages. It does show that the flooding of the petitioner's lands has not been primarily for water-power, that they have not in fact been made use of for that purpose, and that they never had and have not now any market value for that use.

It was contended by the petitioners below, and is contended here, that the court erred in applying to this case the "orthodox" rule of damages, that is, the difference between the value of the land before the taking and its value afterward, and that the court should rather have directed the jury to assess a separate value for the flowage easement taken as a separate unit of property.

The rule of damages actually adopted by the trial court is set out in its charge. (R. 129–130.) That this method was correct and that the other method would be incorrect is demonstrated in the opinion of the Circuit Court of Appeals. (R. 420–423.) (Judge Booth did not express dissent from the view of the majority upon this point.) It is not possible to add to what the court below has already said upon this question, but even if both the courts below were mistaken as to the proper rule of damages the result would be the same. The inquiry is, admittedly, as to market value, whether that be market value of the land as a whole before and after the taking, or market value of the separate

element of availability of reservoir use. Whichever way the subject is approached the same facts are true. The facts which show that there can be no addition to the general market value of the land on account of use or availability for storing water show equally that there can be no market value of the flowage easement considered as a separate unit. Whichever view is taken as to the rule of damages the facts show that there could be no market value for the flowage rights.

Proof was offered at the trial in connection with sales of certain lands similarly situated that the prices paid were somewhat higher than they might otherwise have been on account of the availability of the land for water-storage purposes. (R. 57–72, 91–94, 97, 99–100.) The Government did not object to proof of actual prices paid (R. 95) but did object to the asserted reason, and its objections were sustained. Substantially all the offers of proof related to "lands below 1064," that is, below the line of flowage fixed by the Commission. (R. 59, 64, 67, 68, 71, 90, 91, 99, 100.)

These negotiations and transactions were before 1925, the year of the present treaty, but they were after 1912, the year in which the subject of regulating the level of the Lake of the Woods was referred by the two governments to the International Joint Commission. (Letter of reference, Final Report of the International Joint Commission, Exhibit 71, p. 3.) The Commission did not

report upon the reference until 1917. During the intervening five years the Commission had had a considerable number of public hearings in the territory to be affected by the regulation, and the subject of regulating the levels of the lake by action of the two governments combined was a very active one in the territory concerned and was known to the witnesses. (R. 65–66, 90–91.) It is not surprising that with the taking by two governments officially impending speculative offers for land affected by the taking should have been made. It is, however, quite clear that such transactions and negotiations caused by the likelihood of the very taking which subsequently occurred are not evidence of value in that taking. It is only the "rise in value before the taking not caused by the expectation of that event" which is to be considered. *New York* v. *Sage*, 239 U.S. 57, 61; *Kerr* v. *South Park Commissioners*, 117 U.S. 379, 385–387; *Shoemaker* v. *United States*, 147 U.S. 282, 305; *McGovern* v. *New York*, 229 U.S. 363, 372.

In the circumstances of these lands no one in his senses could have thought that they were available for use as a water-storage reservoir without the joint action of the two governments then under consideration. Any enhanced value in those years based on consideration of their use for storing water necessarily depended on the probability that the reference then before the Joint Commission would result in a governmental taking. An increase of value induced only by that thought is not allowable.

It might be thought that the objection to the proof just mentioned, and to all proof of reservoir availability and value, went more to its weight than to its admissibility, and that, therefore, it would have been more proper for the District Court to hear the evidence, and to deal with the question in the charge. In the normal case this might be so. But the District Court has some discretion in the conduct of the trial, and when, as here, the facts that make market value for a certain purpose nonexistent are proved in detail, and are as overwhelming as they were upon this trial, it is entirely proper for the court to exclude the evidence entirely. *McGovern* v. *New York*, 229 U.S. 363, 369–370, 371, 373; *Kerr* v. *South Park Commissioner*, 117 U.S. 379, 384–387; *Sargent* v. *Merrimac*, 196 Mass. 171.

III

RIGHTS OF ACTION FOR PRIOR FLOODING

Judge Booth's dissent below goes mainly on the proposition that petitioners had valid claims against Canadian authorities for the flooding of their lands prior to the Treaty of 1925; that those claims somehow inhered in the lands as an element of value and should be paid for in these proceedings. With all possible respect for this very able dissenting opinion, it appears to the Government that it is mistaken in several respects. The questions are, first, whether any such rights ever existed against Canada or any Canadian interests; second, whether if they did, they have been as-

sumed by the United States (the only party to this litigation other than the landowners); and third, whether if such claims exist and are enforceable against the United States they have anything to do with the value of the lands in controversy.

The original control of the levels of the lake by the dams placed in the outlets at Kenora was apparently by private interests which, however, from 1898 to date were controlled and regulated constantly by the Governments of Ontario and the Dominion. (R. 237–244.) Whether owners of shore lands on the lake flooded by the operation of these dams had any claim assertable in court against the Canadian authorities is primarily a question of the law of Canada. It is treated fully in the brief filed by counsel for the Government of Canada in this case, and we will not repeat the argument. It should, however, be noted on the American side, first, that the control works were in place and operating before petitioners acquired their lands (R. 94, 99, 169) and while the lands were still public lands of the United States; and, second, that the petitioner's lands were all acquired "subject to the right of the United States to construct and maintain dams for the purpose of creating reservoirs in aid of navigation, and no claim or right of compensation shall accrue from the overflowing of said lands on account of the construction and maintenance of such dams or reservoirs." Indian Appropriation Act July 1, 1898, 30 Stat. 571, 576; Indian Appropriation Act June 7, 1897,

30 Stat. 62, 67; Chippewa Lands Act, January 14, 1889, 25 Stat. 642.

The Canadian dams were not within this reservation because they were not constructed nor maintained by the United States, but the unrestricted right of the United States to flood these lands for navigation might well have a bearing on any claims made by their owners for like flowing by Canadian authority. The Boundary Waters Treaty of 1909 gave certain rights to private parties injured by "any interference with or diversion from their natural channel of such waters on either side of the boundary," but the treaty was careful to set forth that "this provision shall not apply to cases already existing." (Treaty of 1909 between the United States and Great Britain relative to boundary waters, 36 Stat., Pt. 2, p. 2448, Article II.) It seems quite clear that "cases already existing" in this treaty meant cases of "interference with or diversion from their natural channel of such waters on either side of the boundary," referred to in the same article; that is, it meant, among other things, the dams that had existed at Kenora since 1898. The purpose of the parties to the treaty clearly was to create rights in their nationals against each other on account of diversions and obstructions in the future, but not on account of diversions and obstructions then existing.

Assuming, however, that some rights against Canadian authorities existed in the owners of the flooded shore lands prior to 1925, were

the obligations assumed by the United States? Article IX of the Treaty of 1925 (Treaty between the United States and Great Britain in respect of Canada to regulate the level of the Lake of the Woods, February 24, 1925, 44 Stat., Pt. 3, p. 2108) provides in the first paragraph:

> The United States and the Dominion of Canada shall each on its own side of the boundary assume responsibility for any damage or injury which may have heretofore resulted to it or to its inhabitants from the fluctuations of the level of Lake of the Woods or of the outflow therefrom.

By this paragraph the United States agreed as between itself and Canada to be responsible for claims for prior damages to lands upon its side. The treaty does not say and does not mean that private persons shall be authorized to sue the governments for the past flooding, and no court of the United States would have power to entertain a suit against the United States for damages for trespass resulting from an obstruction of waterways in Canada. All that the treaty says and all it means is that each country will deal with the damage claims of its own nationals.

The obligation of the United States to deal with these claims on its side of the boundary was no doubt a legal obligation so far as Canada was concerned (that is to say, if a judgment against Canada had been recovered in a Canadian court by an

American landowner for the trespass, the United States would have been obliged to pay it), but with respect to the claims of owners of land in the United States the obligation of the Government to satisfy their claims was moral only.

Accordingly, in the Act to carry into effect the provisions of this treaty, Congress provided two proceedings (Act of May 22, 1926, c. 364, 44 Stat., Pt. 2, p. 617, amended by Act of April 18, 1928, c. 379, 45 Stat. 431, 432). Section 1 provides for condemnation of the flowage easement. Section 3 provides as follows:

> The Secretary of War is hereby authorized and directed to cause to be investigated, as soon as practicable, all claims for damages caused, prior to the acquisition of flowage easements under this Act, to the inhabitants of the United States by fluctuation of the water levels of the Lake of the Woods due to artificial obstructions in outlets of said lake, and after due notice and opportunity for hearing, shall ascertain and determine the loss or injury, if any, that may have been sustained by the respective claimants and to report to Congress for its consideration the amount or amounts he may find to be equitably due such claimants, together with a statement in each case of the substantial facts upon which the conclusion is based.

In other words, the Congress dealt correctly and exactly with the legal situation as it found it. It

authorized these condemnation suits in which the damage to the property caused by the present taking should be ascertained and paid, and it authorized an investigation of the prior flooding in which the amount "equitably due" to every claimant should be reported to the Congress for its action. The damage claims have never been, and are not now, a legal obligation of the Government of the United States.

Assuming, however, that they were, they have no bearing on this litigation. The only question in the courts below was the damage to the lands in question by the present taking of the flowage easement. The only question here is whether in the circumstances evidence of market value for a storage reservoir was properly excluded. Neither of these questions is affected in the least by the solution of the further question whether the same owners have valid claims for damages for former flooding of their lands.

IV

THE DECISION BELOW DOES NOT CONFLICT EITHER WITH THE TREATY OR THE ACT

Very little remains to be said upon this point.

The only question in the courts below was the measure and amount of compensation payable to the petitioners upon the taking. Neither the Treaty nor the Act lays down any rule upon this

subject. They leave it, necessarily and with entire propriety, to the courts to settle in the condemnation case. It was, therefore, open to the courts below, and it is open to this Court, to state and to apply the true legal rule of damages, without embarrassment by any suggestion either of limitation or enlargement contained either in the Treaty or the Act.

It is, however, reasonably clear that neither the treaty making power nor Congress considered that the owners of the shore lands were entitled to anything except payment for the actual damage to their lands, and neither thought the value of the reservoir should be divided up among them.

The Final Report of the International Joint Commission (Ex. 71) contains careful estimates of cost, including estimates of value of the flooded lands. (Pages 30–31, 59–61, 163–166.) The Commission wished "to emphasize the fact that no part of its investigation has been carried out with greater care than that involving the determination of the value of these various classes of lands adjoining the Lake of the Woods." (Page 60.) The Commission's findings as to damages and values contain no allowance for "reservoir value" or the like. A comparison between the total values found by the Commission ($245,000: Report, p. 39) and the amount of Canada's initial contribution to the cost of securing flowage rights ($275,000: Treaty

of 1925, Article X) shows that in this, as in other respects, the treaty making power relied upon the Commission's work.

The report of the Secretary of War under Section 3 of the Act of 1926, *supra*, has also been submitted to and considered by the Congress. Here also the discussion shows that only damage actually suffered was intended to be paid for, and not theoretical losses based on reservoir availability.[2]

It is not intended to suggest that this understanding by the treaty making power and Congress, is binding on the court, or that it limits the right and power of the court to award to the petitioners the "reservoir value" claimed if they are otherwise entitled to it. But it does show that the action of the court below is in accordance with the purpose both of Congress and the treaty making power.

V

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH THE LOCAL LAW OF MINNESOTA

The effect of multiplicity of titles on values dependent on unification has never been considered by the Supreme Court of Minnesota. But in the

[2] Letter from the Secretary of War transmitting the report; Damage Claims Lake of the Woods; House Doc. 774, 71st Congress, 3d Sess.; Debate on Sen. Joint Res. 124 and House Joint Res. 64, Cong. Record, 72d Cong., 2d Sess., Vol. 76, pages 4535–6; 73d Cong., Vol. 77, pp. 173, 1008; 73d Cong., 2d Sess., Vol. 78, p. 21.

very case cited by petitioners, *Conan* v. *City of Ely,* 91 Minn. 127, 131, the landowner was held (in the passage quoted by the petitioner) "entitled to the value of his property for any use * * * *for which it would ordinarily sell in the market.*" (Italics ours.)

If, as found by the lower courts, union of the required tracts did not have "that degree of probability or possibility which could affect the value of these lands and be an influence or consideration affecting, in the slightest degree, the minds of sellers and buyers thereof in arriving at a fair price therefor" (R. 428), it is plain that the *Conan* case would not require Minnesota courts to treat the use here alleged as a use "for which it (the property) would ordinarily sell in the market." It is unnecessary to discuss *Adams* v. *C. B. & N. R. Co.,* 39 Minn. 286, and *Minneapolis, St. Paul R. & D. Elec. T. Co.* v. *Searls,* 208 Fed. 122. They simply hold that an easement is property, and apparently petitioners' objective is to have the flowage easement valued as the "unit" of property taken. This claim has already been discussed. There is no conflict between the instant decision and the local law of Minnesota.

CONCLUSION

It is, therefore, clear in every view that the lands of the petitioners had no market value for a reservoir, and that none should be allowed.

It is respectfully submitted that the decision of the Circuit Court of Appeals was right, and its judgment should be affirmed.

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MARCH 1934.

APPENDIX

Indian Appropriation Act, approved July 1, 1898, c. 545, 30 Stat. 571, 576, provides:

> For completing the necessary surveys within the Chippewa Indian Reservation in Minnesota, including expenses of examining and appraising pine lands, under the provisions of the Act approved January fourteenth, eighteen hundred and eighty-nine, to be reimbursed to the United States out of proceeds of the sale of their lands, fifty thousand dollars: *Provided,* That all lands *heretofore or hereafter* acquired and sold by the United States under the "Act for the relief and civilization of the Chippewa Indians in the State of Minnesota", approved January fourteenth, eighteen hundred and eighty-nine, shall be subject to the right of the United States to construct and maintain dams for the purpose of creating reservoirs in aid of navigation, and no claim or right of compensation shall accrue from the overflowing of said lands on account of the construction and maintenance of such dams or reservoirs. And the Secretary of War shall furnish the Commissioner of the General Land Office a list of such lands, with the particular tracts appropriately described, and in the disposal of each and every one of said tracts, whether by sale, by allotment in severalty to individual Indians, or otherwise, under said Act, the provisions of this paragraph shall enter into and form a part of the contract of purchase or transfer of title. (Italics ours.)

This legislation is identical with another Indian appropriation Act approved June 7, 1897 (c. 3, 30 Stat. 62, 67) except for the addition in the 1898 Act of the three words italicized above.

Webster-Ashburton Treaty of 1842, 8 Stat. 572, 574, Art. 2:

> It being understood that all the water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand portage, from the shore of Lake Superior to the Pigeon river, as now actually used, shall be free and open to the use of the citizens and subjects of both countries.

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